STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2006
v	No. 254487 Berrien Circuit Court
LORI EVE TOWLE, Defendant-Appellant.	LC No. 2003-400683-FC

Before: O'Connell, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of conspiracy to commit first-degree murder, MCL 750.157a and MCL 750.316. The trial court sentenced defendant to concurrent terms of life in prison without parole. Defendant appeals as of right. We affirm.

This case arises out of the August 18, 2002, murder of Dale Peterson. Russell ("Rusty") Reitz was convicted of first-degree murder for shooting and killing Peterson.[1] Defendant Lori Towle, who was Reitz's girlfriend at the time of the murder, was charged with conspiracy to murder Peterson. Defendant was also charged with conspiracy to murder Charles Casper, who drove Reitz to and from Peterson's home on the night of the murder and knew that Reitz killed Peterson.

Defendant first contends that there was insufficient evidence to support her convictions for conspiracy to commit murder. We disagree.

In reviewing a challenge to the sufficiency of the evidence, we must determine whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). " 'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.' " *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), citing *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The standard of review is

[1] *People v Reitz*, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2004 (Docket No. 250253).

deferential and, therefore, we draw all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *Id*.

A conspiracy is complete upon formation of the agreement, and no overt act in furtherance of the conspiracy is necessary to support a conviction. *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991).

> The gist of the offense of conspiracy lies in the unlawful agreement between two or more persons. Direct proof of agreement is not required, nor is it necessary that a formal agreement be proven. It is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact.
>
> Furthermore, conspiracy may be established, and frequently is established by circumstantial evidence, and may be based on inference. [*People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974) (citations omitted), overruled on other gds *People v Hardiman*, 466 Mich 417; 646 NW2d 158 (2002).]

To sustain a conviction for conspiracy to commit first-degree murder, the prosecution must prove beyond a reasonable doubt that the conspirators deliberated and planned the crime with the intent to kill the victim. Premeditation and deliberation may be inferred from all of the facts and circumstances surrounding the killing. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Plummer*, 229 Mich App 293, 300-301; 581 NW2d 753 (1998).

Viewing the evidence in a light most favorable to the prosecution, the evidence clearly supports the prosecution's theory that defendant conspired with Reitz to kill Casper so that Casper could not testify at Reitz's trial. Casper was with Reitz and defendant on the night of Peterson's murder and knew many details about the killing. Further, Casper both told police about the murder and told defendant that he would not have driven Reitz to Peterson's house if he had known that Reitz was going to kill Peterson.

Moreover, the circumstances and the acts and conduct of defendant and Reitz establish that defendant and Reitz entered into an unlawful agreement to murder Casper. After Reitz was arrested, he offered a fellow inmate $10,000 to kill Casper and told the inmate that defendant had a rifle scope he could use. Reitz also informed the inmate that, if he could not get out of jail and kill Casper, defendant had someone else lined up to do it. The evidence revealed that defendant visited Reitz in jail after being banned from doing so. The inmate, whom Reitz solicited, later talked to Reitz's brother, Robby, about the plan to kill Casper, and Robby indicated that he was supposed to get the gun, the bullets, and the money from defendant.

The evidence also supported the prosecutions theory that defendant was not joking when she spoke to Robby about the plan to kill Casper. She told Robby that she was "a shrewd businesswoman" and that she found someone in South Bend who would kill Casper for $800. Additionally, defendant and her friend, Terry Washington, talked to one of Washington's fellow gang members, who agreed to kill Casper for $2,000 if defendant paid $800 "up front." Defendant gave Washington a picture of Casper, showed him where Casper lived, and told him what kind of car Casper drove.

While defendant testified that she had nothing to do with planning to kill Casper, we draw all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *Nowack, supra* at 400. We find that because the prosecution presented overwhelming evidence of defendant's involvement in the plot to kill Casper, there was sufficient evidence from which a reasonable jury could conclude that the prosecution proved all the elements of conspiracy to commit the first-degree murder of Casper beyond a reasonable doubt.

We also conclude that, when viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to sustain defendant's conviction for conspiracy to commit the first-degree murder of Peterson.

The evidence demonstrated that defendant had a motive to kill Peterson. Although proof of motive is not essential in a prosecution for murder, it is always relevant. *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999), citing *People v Fair*, 165 Mich App 294, 299; 418 NW2d 438 (1987). Peterson and defendant formed a partnership to operate a mortgage business. A couple of months before the murder, however, Peterson formed his own mortgage company and sought to dissolve his partnership with defendant. Defendant was upset because Peterson took her business and "everything" away from her. Moreover, defendant believed that Peterson knew she was embezzling money from the business and that he could "put her in jail for a long time."

The evidence also demonstrated that defendant had the intent to kill Peterson. "Intent, like any other fact, may be proven directly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows." *People v Lawton*, 196 Mich App 341, 349; 482 NW2d 810 (1992) (citation omitted). Defendant told several individuals that she wanted Peterson dead, and she did not say it jokingly. She told her friend and business contact Benjamin Cesaro that one day Peterson "[would] get his." She also told Casper that she wanted Peterson harmed and that she did not care what kind of harm was done to him.

Additionally, a reasonable jury could conclude that the circumstances, acts and conduct of Reitz and defendant establish that they entered into an unlawful agreement to murder Peterson. The evidence supports the contention by the prosecution that defendant created an alibi for the night of the murder by going to Chicago and meeting with Cesaro. Reitz originally told Casper he was going to Chicago with defendant on the night of the murder, but he later said that he was not going with her and Casper "wasn't supposed to let anybody know." On the night of the murder, Reitz would not allow Casper to make any telephone calls from defendant's house. Immediately after the murder, Reitz wanted to go to Chicago to meet up with defendant and, on the way there, Reitz called her. After his telephone call with defendant, Reitz indicated that defendant "was all nervous and freaking out and thought that he had already went to jail and that she was on her way back to Three Oaks." Defendant later asked Casper if he would have accompanied Reitz if he knew what Reitz was going to do. This statement strongly suggests that, when defendant made plans to go to Chicago, she knew Reitz was going to kill Peterson. Defendant subsequently instructed Casper about what to tell the police and, one week after the murder, she washed the inside and outside of Casper's car. Defendant also told Cesaro that it was a good thing she was with him at the time of the murder. At defendant's trial, Reitz admitted he previously testified, at his own trial, that defendant had something to do with the

murder. Finally, defendant admitted to police that she could tell them every detail about the murder.

Viewed in the light most favorable to the prosecution and giving due deference to the jury's determinations, we hold that the evidence was sufficient to prove beyond a reasonable doubt that defendant conspired with Reitz to commit the murder of Peterson.

Defendant next contends on appeal that she was denied the effective assistance of counsel because her trial counsel failed to object to the admission of bad-acts evidence and failed to request a limiting instruction regarding the proper use of the bad-acts evidence by the jury. We disagree.

Because defendant failed to move for a new trial or for a hearing under *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973), this issue is unpreserved. See *People v Noble,* 238 Mich App 647, 661; 608 NW2d 123 (1999). Review of an unpreserved claim of ineffective assistance of counsel is limited to errors apparent on the record. *Id.* at 661, citing *People v Stewart (On Remand),* 219 Mich App 38, 42; 555 NW2d 715 (1996).

In *People v Knapp,* 244 Mich App 361, 385-386; 624 NW2d 227 (2001), this Court set forth the rules governing claims of ineffective assistance of counsel:

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway,* 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens,* 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino,* 187 Mich App 14, 17; 466 NW2 315 (1991), citing *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

We reject defendant's contention that defense counsel was ineffective for failing to object to testimony regarding defendant's use of illegal drugs. The prosecution presented evidence that defendant had numerous conversations with Reitz's brother, Robby, which allegedly implicated her in the conspiracies. Defendant contended that her use of illegal drugs explained why she could not recall these conversations. Defendant has failed to overcome the presumption that it was defense counsel's trial strategy to allow plaintiff's witnesses to testify about defendant's drug addiction, in an attempt to negate the evidence supporting the elements of conspiracy to commit murder. *Knapp, supra.*

Furthermore, other acts evidence may be admitted under MRE 404(b)(1) if: (1) the evidence is offered for a proper purpose, (2) the evidence is relevant, and (3) the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice under MRE 403. *People v VanderVliet,* 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994), citing *Huddleston v US,* 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771

(1988). A proper purpose is a purpose other than establishing the defendant's character to show his propensity to commit the offense. *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998).

The prosecution introduced evidence of defendant's drug use to prove that defendant had a motive to kill Peterson; in particular, the prosecution wanted to establish that defendant hated Peterson for dissolving the partnership and taking away the income she needed to support her drug habit. The prosecution also offered evidence regarding defendant's alleged embezzlement from her partnership with Peterson, as well as defendant's belief that Peterson knew about the embezzlement and "could put her in jail for a long time," to prove that defendant had a motive to kill Peterson. Motive is a proper purpose under MRE 404(b)(1). Further, the testimony regarding the alleged embezzlement was not so prejudicial that it deprived defendant of a fair trial. The prejudicial effect of the testimony was countered by a detective's testimony that during their investigation of defendant, they found no evidence of embezzlement. Finally, the testimony regarding defendant's alleged involvement in the breaking and entering of Peterson's house and defendant's use of a fake identification card to visit Reitz in jail was offered to prove defendant's plan or scheme in committing the conspiracies, which are proper purposes under MRE 404(b)(1).

Because other-acts evidence was relevant, offered for proper purposes under MRE 404(b)(1), and not unfairly prejudicial to defendant because it did not inject "considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock," see *People v Fisher*, 449 Mich 441, 451-452; 537 NW2d 577 (1995), quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984), any objection to the introduction of the other-acts evidence would have been futile. It is well established that defense counsel is not ineffective for failing to make a futile objection. *People v McGhee*, 268 Mich App 600, 627; 709 NW2d 595 (2005), citing *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004).

Further, defense counsel was not ineffective in failing to request a limiting instruction on the proper use of the other-acts evidence by the jury. Defendant cannot overcome the presumption that her counsel's decision not to request the instruction was sound trial strategy. See *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1998). Moreover, defendant has failed to show the existence of a reasonable probability that, if counsel requested the instruction, the result of the proceeding would have been different. See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), citing *Strickland, supra* at 694.

Finally, defendant contends that she was denied a fair trial because of prosecutorial misconduct. We disagree.

We review unpreserved issues of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004), citing *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003), quoting *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

> Generally, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." *People v Rohn*, 98 Mich app 593, 596; 296 NW2d 315 (1980), citing *People v Duncan*, 402 Mich 1; 260 NW2d 58 (1977). They are "free to argue the evidence as it relates to [their] theory of the case." *People v Gonzales*, 178 Mich App 526, 535; 444 NW2d 228 (1989). See also *People v Bigge*, 297 Mich 58, 68; 297 NW2d 70 (1941). Nevertheless, prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members or express their personal opinions of a defendant's guilt, and must refrain from denigrating a defendant with intemperate and prejudicial remarks. Such comments during closing argument will be reviewed in context to determine whether they constitute error requiring reversal. [*People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995).]

The test for prosecutorial misconduct is whether the prosecutor's conduct rose to the level of denying the defendant a fair and impartial trial. *Id.* at 267 n 7.

Defendant contends that the prosecutor improperly implied, during his closing argument, that defendant was involved in an unlawful breaking and entering at Peterson's house. A prosecutor may not construct a closing argument around a theory of the case that accuses the defendant of a crime for which she is not on trial. See *People v Swejowski*, 90 Mich App 366, 371-372; 282 NW2d 5 (1979). However, a prosecutor's statements must not be taken out of context. *Bahoda*, *supra* at 267 n 7, citing *People v Cowell*, 44 Mich App 623, 627-628; 205 NW2d 600 (1973). Rather, the court must evaluate the prosecutor's remarks in light of the relationship or lack of relationship they bear to the evidence admitted at trial. *Id.*

Viewing the prosecutor's remarks in context and in light of the evidence introduced at trial, the prosecutor's reference to the breaking and entering of Peterson's house was not improper. The prosecutor discussed the breaking and entering in an attempt to explain where the murder weapon may have come from and to help explain to the jury the events leading up to Peterson's murder. This was permissible. See *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Further, the prosecutor's statements regarding the breaking and entering were supported by the evidence. It is well established that prosecutors are "free to argue the evidence as it relates to [their] theory of the case." *Bahoda*, *supra* at 282. Thus, the prosecutor's remarks regarding the breaking and entering did not amount to plain error.

The prosecutor's use of the word "evil" in his closing argument, to describe defendant, also did not amount to plain error. "A prosecutor may comment on and suggest reasonable inferences from the evidence," *People v Quinn*, 194 Mich App 250, 253; 486 NW2d 139 (1992), and a prosecutor need not limit his argument to "the blandest possible terms." *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005). Although "[i]t is not proper for the prosecutor to comment on the defendant's character when his character is not in issue[,]" *Quinn*, *supra* at 253, in *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998), this Court held that "[a] well-tried, vigorously argued case should not be overturned on the basis of a few isolated improper remarks that could have been corrected had an objection been lodged."

We conclude that the prosecutor's repeated use of the word "evil" to describe defendant was not clearly improper. The prosecutor made it clear that her description was based on the evidence: "*Taking a look at the evidence*, you can see just how evil the Defendant really is and

why she wanted Dale Peterson and Charles Casper dead." [Emphasis added.] The prosecutor was referring to the evil nature of defendant's *acts* (her conspiracies to murder), not her character. The prosecutor referred to "the evilness of all this," i.e., of the conspiracies, again expressly prefacing that description by a reference to the evidence. The prosecutor's use of the term "evil" was a description of defendant's behavior, as shown by evidence: "She demonstrated that evil. You heard that evil on tape. And that evil is substantiated by three different witnesses." While admittedly an aggressive argument, we hold that the prosecution's use of the term "evil", on the particular record before us, was not misconduct.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kurtis T. Wilder